In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-836

ILARIO ZANNINO, PETER LIMONE, AND JOSEPH P. BALLIRO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the denial of their second unsuccessful motion for a new trial based on alleged newly discovered evidence. In 1970, after a jury trial in the United States District Court for the District of Massachusetts, petitioners and one Lewis Strauss were convicted of having transported stolen jewelry in interstate commerce, knowing it to have been stolen, in violation of 18 U.S.C. 2314. Petitioners Zannino and Limone were each sentenced to seven years' imprisonment; petitioner Balliro was sentenced to five years' imprisonment.

Several days after the verdict, petitioners moved for a new trial alleging that they had found newly discovered evidence in a notebook kept by a Boston police officer (Timmons) indicating that he had met with one Soroko, a principal government witness, at the same time that Soroko had testified he was meeting with petitioners in connection with the instant offense. After a hearing, the district judge denied the motion. The court of appeals affirmed the convictions and the denial of the motion for a new trial, 443 F. 2d 986, and this Court denied certiorari, 404 U.S. 851.

The court of appeals pointed out in that opinion that Timmons had testified at the hearing that he had no independent recollection of the meeting; that the evidence indicated that he had made this entry in his notebook at a time subsequent to the meeting; that another officer had testified from personal recollection that the meeting occurred between noon and 1:00 p.m.; and that the trial judge at the conclusion of the hearing had so found. 443 F.2d at 989–990.

With respect to the present proceeding, petitioners filed in the district court a second motion for a new trial based upon alleged additional newly discovered evidence regarding the same underlying factual issue. The motion was based principally on an affidavit from Lieutenant DeFuria (who had testified at trial that the meeting with Soroko had taken place between noon and 1:00 p.m.) that his memory had been refreshed and that he now believed the notebook entry correctly indicated the time of the meeting as 3:30 p.m. After an evidentiary hearing, the district judge

denied the motion (Pet. App. 49–55), finding that Lieutenant DeFuria had no new independent recollection of the time but had "restructured" his recollection to fit the 3:30 p.m. entry in Timmons' notebook; that the prior finding of the court about the time of the meeting was accurate and that, for a variety of reasons, DeFuria's revised testimony should be "disbelieved"; that DeFuria's testimony in any event did not show that Soroko's statements at trial were false since Soroko had said that he had no independent recollection about the time and was giving only "rough, rough estimates"; and that the alleged refreshed recollection of DeFuria did not constitute newly discovered evidence (*ibid.*).

The court of appeals affirmed (Pet. App. 38–47), holding that the district judge had not abused his discretion in his factual conclusions and in denying the second motion.[1] The court also rejected petitioners' contention that the trial judge erred in failing to disqualify himself from hearing the present motion on the ground that he had already determined certain facts contrary to those urged in support of the motion. The court noted that petitioners had not objected to the judge's passing on their motion until their appeal. (Pet. App. 45–46).

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[1] The court did not reach the question whether the district judge had properly concluded that refreshed recollection does not constitute newly discovered evidence, although the court of appeals did indicate that it was "inclined to agree" with this position (Pet. App. 43, n. 10).

Petitioners here reassert the factual issues resolved against them by the two courts below and again urge that the trial judge should have disqualified himself despite the lack of objection interposed by petitioners to his hearing the second motion. These contentions pose no question of general significance and are answered in the thorough opinions below on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

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